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Supreme Court, U.S.
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No. 99-1042

IN THE

# Supreme Court of the United States

ROBIN ZAHRAN and KAREN ZAHRAN,

*Petitioners,*

*v.*

GERALD G. SCHMIDT, JR., Individually, and the law firm of SCHMIDT DARLING & IRWIN, and COREGIS INSURANCE COMPANY, Third-Party Defendant, and ROBERT C. BURRELL, Individually, and the law firm of BORGELT, POWELL, PETERSON & FRAUEN, and RELIANCE INSURANCE COMPANY, Third-Party Defendant, and MARJAN R. KMIEC, Individually, and the law firm of KMIEC LAW OFFICE, and he WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, Third-Party Defendant,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS MARJAN R. KMIEC, KMIEC LAW OFFICE AND WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the plaintiffs waive the right to a jury trial by not timely requesting a jury trial, by not objecting to Judge Gordon's decision that there would be no jury trial, by not raising this issue on motions after verdict, or by not raising this issue in the Court of Appeals?

2. Are the district court's findings clearly erroneous, giving due regard to the district court's opportunity to judge the credibility of witnesses?

3. Have the lower courts properly interpreted Wisconsin law on misrepresentation in the context of a proof of loss submitted to an insurance company?

4. Have the lower courts properly interpreted Wisconsin law on the "innocent insured" doctrine?

5. Were the district courts' evidentiary rulings a proper exercise of discretion, and, in any event, would any evidence that was excluded have changed the result?

6. Did the courts below do anything improper with respect to the assignment of judges?

7. Were the plaintiffs denied a fair trial because of alleged prejudice of the lower courts?

8. Are the sanctions imposed against the Zahrans by the Seventh Circuit appropriate?

9. Was the district court's judgment in favor of Kmiec and against the Zahrans for breach of contract in the amount of $20,000 clearly erroneous giving due regard to the district court's opportunity to judge the credibility of witnesses?

## STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, Wisconsin Lawyers Mutual Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented for Review | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | vi |
| Statement of Subject Matter and Appellate Jurisdiction | 1 |
| Statement of the Case | 1 |
| A. Nature of the Case | 1 |
| B. Proceedings Below | 2 |
| C. Statement of Facts | 3 |
| D. Testimony of Thomas Gooch | 6 |
| E. Testimony of Marjan Kmiec | 7 |
| F. Testimony of Ward Richter | 8 |
| G. Testimony of Robin Zahran | 8 |
| Summary of Argument | 10 |
| Reasons for Denying the Writ | 11 |

*Contents*


| | | *Page* |
|---|---|---|
| I. | Standard Of Review. ..... | 11 |
| II. | The Petition Does Not Identify Issues That Meet The Criteria For Granting A Writ Of Certiorari. ..... | 12 |
| III. | The Zahrans Waived Their Right To A Jury Trial, And Waived Any Argument Relating To The Denial Of A Jury Trial By Failing To Raise This Issue In The Court Of Appeals. ..... | 13 |
| IV. | The Trial Court Correctly Applied Wisconsin Law On Legal Malpractice Cases And The Plaintiff's Need For Expert Testimony. ..... | 16 |
| V. | Whether Frankenmuth Relied On The Zahrans' Misrepresentations Was Not An Issue In This Case Under Wisconsin Law. ..... | 19 |
| VI. | The Attorneys Representing The Zahrans Did Not Have A Conflict Of Interest Because Of The "Innocent Insured" Doctrine. ..... | 21 |
| VII. | The Judges Below Were Properly Assigned To The Case, And They Were Not Prejudiced Against The Zahrans, Or Motivated By Revenge Against The Zahrans. ..... | 23 |

*Contents*

*Page*

VIII. The Trial Court Properly Exercised Discretion Over The Admission Of Evidence. ..... 25

A. The Pre-Trial Orders Relating to the Opinions of Mr. Gooch. ..... 26

B. The Pre-Trial Order Relating to Evidence of Alleged Conspiracy. ..... 26

C. The Trial Court's Exclusion of the Witnesses from the Underlying Case was Proper. ..... 27

IX. This Court Should Have No Interest In Reviewing The Contract Issue Between Kmiec And The Zahrans, But In Any Event Judgment In Favor Of Kmiec Was Proper. ..... 28

X. Propriety Of Sanctions. ..... 29

Conclusion ..... 29

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*American Casualty Company of Reading, PA v. Cianciolo, Inc.*, 987 F.2d 1302 (7th Cir. 1993) ..... 19

*Apolskis v. Concord Life Insurance Company*, 445 F.2d 31 (7th Cir. 1971) ..... 11

*Clark v. Universal Builders, Inc.*, 706 F.2d 204 (7th Cir. 1983) ..... 11

*Dohman Company v. Niagara Fire Insurance Company*, 96 Wis. 38, 71 N.W. 69 (1897) ..... 19

*Everlite Manufacturing Company v. Grand Valley Machine & Tool Company*, 44 Wis. 2d 404, 171 N.W.2d 188 (1969) ..... 28

*Hedtcke v. Century Insurance Company*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982) ..... 21

*Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985) ..... 17

*Holman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) ..... 11

*Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 276 N.W.2d 284 (1979) ..... 16, 17

*Cited Authorities*

*Page*

*State Farm Fire and Casualty Insurance v. Walker*, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990) ..... 8, 21

*Stebane Nash Company v. Campbellsport Mutual Insurance Company*, 27 Wis. 2d 112, 133 N.W.2d 737 (1965) ..... 19, 20

*Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis. 2d 17, 473 N.W.2d 549 (Ct. App. 1991), *affirmed and modified on other grounds*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992) ..... 7, 13, 19, 20

*Thomas Buchinger v. Robin Zahran*, Circuit Court of Manitowoc County, Wisconsin, Case No. 83-CV-697 H ..... 10

*Zahran v. Frankenmuth Mutual Ins. Co.*, 19 F.3d 1436, 1994 WL 107909 (7th Cir. Wis.) ..... 19, 22

**Statutes:**

28 U.S.C. § 1254 ..... 1

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1332 ..... 1

**Rules:**

Fed. R. Civ. P. 52(a) ..... 11

Supreme Court Rule 10 ..... 12

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Petition does not contain a statement on jurisdiction.

Jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. § 1332.

The court of appeals had jurisdiction under 28 U.S.C. § 1291 and this Court has jurisdiction under 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

### A. Nature of the Case

This is a legal malpractice action commenced against three Wisconsin attorneys. The defendant attorneys represented the Zahrans in one of the several actions they commenced against Frankenmuth Mutual Insurance Company. In the action in question the Zahrans sued Frankenmuth for compensatory damages and bad faith as a result of Frankenmuth's alleged improper adjustment of a property damage claim arising out of a tornado or wind loss at a farm owned by the Zahrans in Wisconsin. Frankenmuth counter-claimed alleging misrepresentation in the filing of specific proofs of loss. Frankenmuth sought to void the policy and to recover from the Zahrans all sums paid by Frankenmuth as a result of the tornado.

The Zahrans were initially represented by the Fitzsimmons firm in Illinois, which started the action, and then, in turn, by Attorney Schmidt, Attorney Burrell and Attorney Kmiec. Mr. Kmiec was counsel for the Zahrans when the case was tried to a jury in the United States District Court for the Eastern District of Wisconsin, the Honorable Judge Thomas Curran presiding. During the trial

Frankenmuth offered $110,000 to settle that case. Attorney Kmiec recommended that the Zahrans settle, but his advice was rejected. Eventually, during the trial, Mr. Zahran gave Mr. Kmiec a handwritten note promising to pay him $20,000, win or lose. Mr. Zahran did this to get Mr. Kmiec to stop talking about settlement, and Kmiec did not discuss settlement with the Zahrans during the trial again.

At trial the Zahrans sought to recover compensatory damages well beyond the $182,000 which had been paid by Frankenmuth. Frankenmuth proved that the Zahrans' proofs of loss for the tornado became ever larger as time went by.

In December, 1991 the jury returned a verdict in favor of Frankenmuth, finding that the Zahrans had misrepresented their loss in their sworn proofs of loss. The trial court entered judgment dismissing the Zahrans' claim with prejudice. The Frankenmuth counter-claim was dismissed without prejudice.

Against Mr. Kmiec's advice, the Zahrans appealed *pro se*. The court of appeals affirmed the dismissal of the Zahrans' claims, and found that Frankenmuth should have been granted judgment on its counter-claim. As a result judgment was entered in favor of Frankenmuth and against the Zahrans in the sum of approximately $182,000.

On March 31, 1995, the Zahrans commenced this action against the three Wisconsin attorneys who represented the Zahrans in the wind storm loss. The Zahrans made a number of allegations against the defendant attorneys. None of these claims had any merit. They were simply the continuation of the Zahrans' habit and practice of pursuing meritless claims.

**B. Proceedings Below**

This case was tried to the court, the Honorable Charles Clevert, District Court Judge for the Eastern District of

Wisconsin, presiding, over several days during the summer of 1997. On September 23, 1997 the trial court issued an extensive oral decision finding in favor of the defendants. Judgment was entered on September 24, 1997, dismissing the Zahrans' claims with prejudice, and awarding judgment on Kmiec's counter-claim. Motions for reconsideration and motions to alter and amend the judgment were denied, and on April 10, 1998 the district court entered an amended judgment, again dismissing the Zahrans' claims and again granting judgment to defendant Kmiec on the counter-claim.

The Zahrans' appealed. The court of appeals issued its decision affirming the district on April 14, 1999. On August 19, 1999, the court of appeals issued an Order imposing sanctions upon the Zahrans. That Order was followed by an Amended Order imposing sanctions on September 7, 1999.

## C. Statement of Facts

The Petition's "Statement of Facts" and "Procedural History in the Courts Below" contain so many misstatements of fact that we doubt that we could thoroughly discuss each misrepresentation without presenting an extremely long submission. Therefore, we will merely set forth the following facts, the facts pertinent to the decisions below.

Karen and Robin Zahran have been married for twenty-two years, and neither has ever filed for separation or divorce. R. 390 p. 72.[1] Together they owned a farm in Denmark, Wisconsin, a home in Oak Brook, Illinois and a cottage in Door County, Wisconsin. R. 390 p. 72. They always filed joint tax returns. R. 390 p. 73.

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1. Citations to the record indicate the record document number and the page.

Robin Zahran is an insurance agent, licensed to sell life, health, property and casualty insurance. He is familiar with taking applications for insurance. R. 389A pp. 76-77.

Mrs. Zahran had authority to write checks for the farm business, and for the insurance business. R. 390 p. 73. The Frankenmuth checks for the tornado loss designated her as one of the payees, and she did endorse some of those checks. R. 390 p. 73.

From approximately 1986-1988 the Zahrans had been insured through Kossuth Mutual Insurance Company. R. 389A pp. 78-79. Then the Zahrans were insured through American Family from approximately April 1988 through July 1988. Kossuth Mutual non-renewed the Zahrans, and American Family canceled them. R. 389A. p. 78.

The American Family application, signed by Mr. Zahran, in response to a direct question about prior claims, revealed one claim. In fact there had been nineteen claims under the Kossuth policy. R. 389A pp. 85-89.

After American Family canceled the Zahrans there was litigation in Brown County Wisconsin, involving the American Family application. R. 389A p. 99. After a trial the judge found that the American Family policy had been obtained by misrepresentation with respect to the claims history. R. 389A p. 97. That finding was upheld by the Wisconsin Court of Appeals in a decision rendered on October 16, 1991, two months before the jury verdict in the Frankenmuth tornado case. R. 389A p. 100. So court decisions finding misrepresentation by Mr. Zahran relating to insurance were of record before the trial in the tornado case.

In July 1988 the Zahrans became insured with Frankenmuth. R. 389A p. 77. In July 1990, approximately

nine months before the Zahrans ever met Mr. Kmiec, Frankenmuth canceled the Zahran's coverage. The were still uninsured at the time of the trial. R. 389A pp. 101-102.

The Zahrans sustained several losses to their farm while they were insured with Frankenmuth: a wind storm or tornado, and two fires. The tornado struck on May 24, 1989. The fires occurred after that, one on March 18, 1990 and another in July 1990. Several of the arguments made by the Zahrans require some understanding of the timing of these losses, the timing of the proofs of loss submitted to Frankenmuth, and the timing of the commencement of the Zahran lawsuits against Frankenmuth.

The lawsuit against Frankenmuth arising out of the 1989 tornado loss, was filed in March 1990, before the March 18, 1990 fire at the Zahrans' farm. The Frankenmuth answer and counter-claim in the tornado case alleging misrepresentation was filed in April 1990, before any proofs of loss were filed as a result of either of the fires. R. 383, Trial Ex. 403. Even the plaintiffs' expert, Mr. Gooch, acknowledged that the allegations of misrepresentation in Frankenmuth's pleadings in the tornado case arose out of the proofs of loss submitted for the tornado loss, not the fire loss as Mr. Zahran has so frequently contended. R. 380 p. 106-109.

Robin Zahran admitted that none of the defendant attorneys assisted in any way in the preparation of the proofs of loss in the tornado case. R. 389A pp. 104-106. The July 25, 1989 proof of loss made claims for approximately $240,000. R. 389A p. 108. In the summer of 1989 Frankenmuth made payments of approximately $161,000, leaving a claim that should have been for about $78,000 as of August 1989. R. 389A pp. 108-118. But in September 1989 the Zahrans submitted a proof of loss, not for $78,000, but for $180,000. R. 389A pp. 122-126. By letter dated

September 22, 1989 the Zahrans advised Frankenmuth that their claim had grown to $314,000. R. 389A pp. 128-132.

Mrs. Zahran signed the proofs of loss dated in July and September 1989, and she said she thought that they truly and accurately reflected the losses sustained by her and her husband. R. 390 pp. 48-49. She agreed with the damages claimed in the September 22, 1989 letter from her husband to Frankenmuth. R. 390 pp. 74-77. Mrs. Zahran has never disavowed the proofs of loss, or in anyway indicated that she disagreed with the damages claimed on the proofs of loss. R. 390 p. 79.

The Zahrans jointly agreed to bring a lawsuit against Frankenmuth for the tornado claim. R. 390 pp. 76-77. Mrs. Zahran had direct interaction with the defendant attorneys. R. 390 p. 77 On the occasions when her husband spoke with the defendant attorneys he was authorized to speak on her behalf. R. 390 pp. 86-87.

Attorney Joan Slezak commenced the fire litigation for the Zahrans against Frankenmuth in the spring of 1991, and she remained the attorney of record until April 1992, at which time the Zahrans proceeded *pro se*. R. 389A pp. 144-147. Karen and Robin Zahran ended up trying the fire case together, *pro se*. R. 390 pp. 84-85.

**D. Testimony of Thomas Gooch**

Mr. Gooch was admitted to practice law in Illinois in 1979. He is not licensed to practice law in Wisconsin, or in any state other than Illinois. R. 380 pp. 5, 10, 138. He has tried one case in Wisconsin. R. 380 pp. 13, 104.[2] If he has a

2. One ironic and telling fact in this case is that the individual plaintiffs, Robin and Karen Zahran, had, at the time of the trial in this case, already tried the fire case twice, *pro se*. They had more trial experience in Wisconsin than their expert.

case venued in Wisconsin, he typically refers that to Wisconsin counsel. R. 380 p. 104. Mr. Gooch has been a very good friend of Mr. Bickley, counsel for the Zahrans in this case, for a number of years. R. 380 p. 105.

Mr. Gooch testified that in his opinion the defendant attorneys all had a conflict of interest, because, in his opinion, Mrs. Zahran was an "innocent insured" under Wisconsin law. R. 380 pp. 119-121, 124-125. He acknowledged that if his opinion on Wisconsin law regarding innocent insured was wrong then that would certainly go to the weight that the court would put on his other opinions. R. 380 p. 126. He admitted that if Mrs. Zahran did not qualify as an innocent insured then his criticism of the defendant attorneys on the conflict of interest issue would be unfounded. R. 380 p. 128.

**E. Testimony of Marjan Kmiec**

Mr. Kmiec was retained to represent the Zahrans in the tornado case, not in the case arising out of the fires. R. 389 pp. 6-7, 32.

Mr. Kmiec testified that in Wisconsin, under the *Tempelis* case, an insurance company need not show reliance in order to void a policy, if there is misrepresentation on a proof of loss. R. 389 p. 46.

Mr. Kmiec was aware of the "innocent insured" rule, but he did not believe it applied to the Zahrans. R. 389 p. 24. Mrs. Zahran never disagreed with the proofs of loss or any of the supporting documents. She never indicated that she thought she was entitled to some damages different from what was claimed by Mr. Zahran. R. 389 p. 25.

During the trial Frankenmuth offered $110,000 to settle the case. Mr. Kmiec repeatedly strongly recommended that the Zahrans take the settlement, but Mr. and Mrs. Zahran

decided to reject the settlement. R. 389 pp. 40-42. Mr. Zahran drafted and signed a note indicating that he would pay Mr. Kmiec $20,000, win or lose, to get him to stop discussing settlement. R. 389 pp. 41-42, R. 381 pp. 6-8.

**F. Testimony of Ward Richter**

Mr. Richter, a Wisconsin attorney, was called as an expert on behalf of Mr. Kmiec. He testified that the innocent insured doctrine did not apply to Karen Zahran under Wisconsin law. R. 393 pp. 107-112. The defendant attorneys did not have a conflict of interest in representing both Mr. and Mrs. Zahran in the wind loss claim. R. 393 p. 112.

As to the reliance issue, it was Mr. Richter's opinion that if an insurer can prove intentional misrepresentation on a proof of loss then the insurer can void the policy without regard to reliance under Wisconsin law. R. 393 pp. 117-120. Mr. Richter testified that an argument could be made that the policy in question was ambiguous, but to make that argument you would have to ignore the Wisconsin law that was on the books, *Tempelis* and *Walker*. R. 393 pp. 64-67.

**G. Testimony of Robin Zahran**

Mr. Zahran admitted that the written contingency fee agreement with Mr. Kmiec, signed only by Mr. Zahran, also applied to Karen. R. 389A p. 144. Mr. Zahran admitted that he gave the note to Mr. Kmiec, promising to pay him $20,000 win or lose, in order to get Mr. Kmiec to stop talking about settlement. R. 389A pp. 149-150.

As part of the damages claimed against the defendant attorneys, Mr. Zahran claimed that the finding of misrepresentation in the Frankenmuth tornado case caused his inability to get insurance coverage. R. 389A p. 99. However, there were other reasons why he was uninsured,

and they pre-dated the tornado trial, as indicated above. By the time the tornado case went to trial there was already a finding by a court of record that he had been guilty of misrepresentation on an insurance application. R. 389A p. 100.

As part of the damages in this case Mr. Zahran alleged that the actions of the defendant attorneys, and the loss of the Frankenmuth tornado trial, caused damage to his credit. R. 389A p. 153. However, before the Zahrans ever met Mr. Kmiec the Old Kent Bank had started a foreclosure action against the Zahrans' residence in Illinois. True to form, the Zahrans counter-claimed, alleging that the bank had damaged them personally and professionally, and had damaged their credit reputation. R. 389A pp. 153-155. Before the Zahrans ever met Mr. Kmiec, William Radue started a foreclosure against property owned by the Zahrans in Manitowoc County, Wisconsin. R. 389A pp. 156-159.

The Zahrans commenced a suit against Providence Washington Insurance Company alleging failure of Providence Washington to pay property damages as a result of a wind loss to their home. Again, the Zahrans alleged damage to their credit reputation. R. 389A p. 159.

This case is not the first case of legal malpractice commenced by the Zahrans. The tornado litigation was commenced by the Fitzsimmons law firm in Illinois and that firm brought an action against the Zahrans for failure to pay fees. Robin Zahran counter-claimed alleging legal malpractice. R. 389A pp. 162-164; Exs. 448A and 448B.

Attorney James Presentin of Green Bay, Wisconsin represented the Zahrans, and had to sue them for fees. The Zahrans counter-claimed alleging malpractice. R. 389A pp. 166-167; Ex. 451.

At trial Mr. Zahran testified under oath in front of Judge Clevert that he had never, prior to the trial, lied under oath. In fact, he had lied under oath in a deposition on May 11, 1984 in the case of *Thomas Buchinger v. Robin Zahran*. Mr. Zahran had never received a degree from a university in the United States, but he testified under oath that he had gone to MIT in Boston and had obtained a degree in math and physics in 1973. R. 389A pp. 172-174.

## SUMMARY OF ARGUMENT

The Zahrans have made no showing that the case is worthy of this Court's review. They have not addressed the criteria employed by the Court in passing on petitions for writs of certiorari.

The Zahrans contend that they were denied a jury trial, when, as will be seen below, they waived their right to a jury trial.

This was a trial to the court. Under Wisconsin law the legal malpractice alleged by the Zahrans required that the Zahrans present expert testimony. One of the principal issues for the fact finder was the credibility of the expert witnesses. The trial court found the testimony of the Zahrans' expert to be unworthy of belief, and adopted the defense experts' opinions. The court of appeals recited the reasons why the district court found the plaintiffs' expert's opinions to be unworthy, and stated that there was abundant support in the record for this finding. Court of Appeals Order dated April 14, 1999, page 3.

All of the other arguments presented are a rehash of arguments previously made by the Zahrans in this and other cases. It generally comes down to the Zahrans' favorite theory: if they lose they have been the victim of fraud or prejudice. The purveyors of "prejudice" now include not only

Frankenmuth, the Manitowoc County Sheriff's Department, (R. 171, Ex. 21) and the defendant attorneys, but also Judge Clevert and the judges of the Seventh Circuit. Those guilty of "fraud" include not only everyone associated with Frankenmuth, and the defendant attorneys, but now also Attorney Cohen, the Chicago attorney who tried to help the Zahrans with their appeal. Petition p. 11.

The court of appeals was exactly correct when it said "It is time for this endless litigation to stop." Court of Appeals Order dated September 7, 1999, page 3.

## REASONS FOR DENYING THE WRIT

## I.

## STANDARD OF REVIEW.

In cases tried to the court:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Fed. R. Civ. P. 52(a).

The district court's findings of fact should not be set aside unless they are "clearly erroneous." *See Clark v. Universal Builders, Inc.*, 706 F.2d 204 (7th Cir. 1983), citing *Holman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982). The appellate court gives "substantial deference" to the findings of the district court, especially where the district court decided the credibility of witnesses. *Clark, supra*, 706 Fed. 2d at 206, citing *Apolskis v. Concord Life Insurance Company*, 445 F.2d 31, 34 n.1 (7th Cir. 1971).

## II.

## THE PETITION DOES NOT IDENTIFY ISSUES THAT MEET THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

The Zahrans have made no effort to demonstrate that this case meets any of the criteria used by this Court in exercising its discretion on petitions for writs of certiorari. *See* Supreme Court Rule 10. There is no suggestion that the decision of the court of appeals is in conflict with decisions of another court of appeals. Nor is there any *genuine* effort to demonstrate that the court of appeals decision is in conflict with decisions of the Wisconsin Supreme Court. The allegations to this effect actually misrepresent Wisconsin law. We will address each section of the Petition in turn.

The first section of the Petition asserts that the Zahrans were improperly denied a jury trial. As will be seen below, they waived a right to a jury trial by not requesting a jury trial until the case had been pending for more than two years, when trial was only five weeks away. In addition, this is an issue that was not preserved in the court of appeals.

In the second section of their Petition, the Zahrans contend that the lower courts "defected" from Wisconsin law on "expert's malpractice." Here, they discuss the alleged opinions of their expert, and argue that their expert should have been believed. The Zahrans argue nothing other than alleged erroneous factual findings or the misapplication of a properly stated rule of law. Even if these assertions had some merit, they would not warrant the granting of the Petition. *See* Supreme Court Rule 10.

The third section of the Petition contains an argument that the courts below have not properly applied Wisconsin law on some insurance questions. In particular, the Zahrans

contend that the courts below have improperly interpreted or applied the rule of *Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis. 2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), *affirmed and modified on other grounds*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992). The lower courts have properly applied Wisconsin law. The Zahrans persist in seeking an improper application of the law. In any event, alleged improper application of an established rule of law is insufficient to warrant this Court's review.

The fourth section of the Zahrans' Petition alleges impropriety in the assignment of the trial judge and the panel of circuit judges in the Seventh Circuit. However, there is no explanation as to why or how the alleged improper assignment was made. The Zahrans rely upon nothing but bald assertions of prejudice and abuse. These allegations are typical of the unsubstantiated and irresponsible allegations frequently made by the Zahrans during their numerous litigations. They should be ignored.

The Zahrans have set forth no reasons to grant the petition, and it should be denied.

## III.

## THE ZAHRANS WAIVED THEIR RIGHT TO A JURY TRIAL, AND WAIVED ANY ARGUMENT RELATING TO THE DENIAL OF A JURY TRIAL BY FAILING TO RAISE THIS ISSUE IN THE COURT OF APPEALS.

The first paragraph of the argument in the Petition is such a blatant attempt at deception that it warrants reproduction here.

> The subject complaint was originally assigned to Judge Gordon who granted Zahrans' motion to file their amended complaints in February, 1997.

> Karen Zahran filed her amended complaint and demanded a jury trial per Rule 38(b). Judge Clevert was substituted for Judge Gordon. He immediately struck the jury demand the first time he held a hearing to familiarise [sic] himself with up to date history of the case. Zahrans objected to his striking the jury demand and the court denied their objections.

Petition p. 12.

Actually Judge Gordon decided there would be no jury trial. He made that ruling in October 1996, when the case had been pending for 19 months without a jury demand. An amended complaint, filed in February 1997 by Robin Zahran did *not* contain a jury demand. Karen Zahran's Third Amended Complaint was not filed until May 1997, and it was eventually struck because she did not have leave of court to file that pleading at that late date. Judge Clevert received a motion for a jury trial when the case was five weeks away from trial, and had been pending for more than two years. He found that any right to a jury trial had been waived, and, under the circumstances, that decision was certainly a proper exercise of discretion.

The above quoted passage from the Petition was clearly designed to suggest something other than what really happened, not an uncommon occurrence in Zahran litigation. Below we will set forth the detailed history on this issue, with citations to the record.

The initial Complaint, filed on March 31, 1995, contained no request for a jury trial. (R. 1). The defendants' Answers did not contain a request for a jury trial. (R. 4, 8). Kmiec filed counterclaims and the Zahrans responded, and none of those pleadings contained a demand for a jury. (R. 19, 26). The Amended Complaint filed on December 7,

1995, did not contain a request for a jury trial. (R. 27). The responses to the Amended Complaint did not contain a demand for a jury trial. (R. 32, 34, 37). The Second Amended Complaint filed on September 25, 1996, did not contain a request for a jury trial. (R. 95). The answers to the Second Amended Complaint did not contain a request for a jury trial. (R. 98, 99, 100 ).

During a status conference on October 7, 1996, Judge Myron Gordon repeatedly stated that the trial would be a court trial, not a jury trial, because no one had asked for a jury trial. (R. 104, pp. 19-20, 22, 25.) Attorney Bickley, appearing on behalf of the Zahrans, made no objection.

Another Amended Complaint was filed by plaintiff, Robin Zahran, on February, 4, 1997. (R. 132). It did not contain a jury demand. The defendant's answers to that pleading did not contain a jury demand. (R. 138, 140, 135).

On May 2, 1997, Judge Charles Clevert reiterated that this would be a court trial, not a jury trial. (R. 231, pp. 139-143.) At that point the case was scheduled for a court trial to begin on June 30, 1997, less than two months away.

On May 9, 1997, Karen Zahran filed a Third Amended Complaint with a demand for a jury trial. (R. 236). Then, by motion dated May 20, 1997, Karen Zahran moved for trial by jury. (R. 241). This was five weeks before the commencement of the trial. The court found that Karen Zahran had waived her right to a jury trial and that she had not been given permission to file a Third Amended Complaint at such a late date. (R. 264).

The Zahrans did not raise this jury trial issue in the court of appeals. Their first brief in the court of appeals did not address this jury trial issue. Then the Zahrans were given time to file a supplemental brief, but the brief was filed late.

The court denied the Zahrans' motion to file that brief late, so the supplemental brief was never properly filed.

The respondents' briefs responded to the original brief, the only one which had been properly filed, and since it did not address the jury trial issue, the response briefs did not address this issue.

In their reply brief, the Zahrans, for the first time in a properly filed brief, raised the issue of the denial of a jury trial. Obviously, raising this issue in the reply brief, when it had not been raised in the initial brief, or addressed by the respondents' briefs, was inappropriate, and insufficient to preserve the issue for further appeal. Since the properly filed briefs before the court of appeals did not address the issue the decision of the court of appeals did not address the jury trial issue.

This jury trial issue was waived in the trial court and was not preserved on appeal.

## IV.

## THE TRIAL COURT CORRECTLY APPLIED WISCONSIN LAW ON LEGAL MALPRACTICE CASES AND THE PLAINTIFF'S NEED FOR EXPERT TESTIMONY.

The elements of a legal malpractice case in Wisconsin are set forth in *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 277, 276 N.W.2d 284 (1979), as follows:

> In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate

> cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.

*Lewandowski*, 88 Wis. 2d at 277-276.

In *Lewandowski* the Wisconsin Supreme Court stated that:

> Regardless of the approach used to resolve the issue of liability and damages in a legal malpractice case the ultimate goal should be to determine what the outcome should have been if the issue had been properly presented in the first instance.

*Lewandowski*, 88 Wis. 2d at 281, 276 N.W.2d 284.

These principles were reiterated in *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985). On the need for expert testimony, the *Helmbrecht* court stated:

> Expert testimony is generally necessary in legal malpractice cases to establish the parameters of acceptable professional conduct, given the underlying fact situation. Expert testimony is not required in cases where the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors.

*Helmbrecht*, 122 Wis. 2d at 111-112.

In this case the alleged negligence is not obvious, and the standard of care is not within the ordinary knowledge and experience of jurors. The district court specifically so held. R. 337 pp. 26-28. On each item of alleged negligent conduct the Zahrans had to present the testimony of an expert.

The Zahrans' expert on legal malpractice was Thomas Gooch, a long time very good friend of Mr. John Bickley, the Zahrans' attorney. Mr. Gooch and Mr. Bickley are both from Illinois. Mr. Gooch had tried one case in Wisconsin. Mr. Gooch testified at trial, expressing a variety of opinions adverse to the defendants.

The district judge specifically found that this case was "in large measure about credibility." R. 337 p. 3. The court found that the testimony of Thomas Gooch, the plaintiffs' expert, was not worthy of belief. R. 337 p. 15. The district judge rendered an extensive oral decision, making findings that were in accord with the testimony of the defendants and their experts, not the testimony of the Zahrans' expert. The district court found that the Zahrans had failed to demonstrate that the result in the tornado trial would have been different if that trial had been handled as the Zahrans suggested at the trial in this case. R. 337, p. 23.

The Zahrans argue that even though the trial court found Mr. Gooch's testimony to be not worthy of belief, the Zahrans should have prevailed because the alleged failures of the defendant attorneys were within the area of common knowledge and lay comprehension. Petition p. 15. That simply is not the case, and the trial court so found. R. 337 p. 27.

The decision in favor of the defendants is a result of the trial court's evaluation of the credibility of the experts. It is clearly a correct result, and not in any sense clearly erroneous.

The court of appeals affirmed, correctly giving deference to the trial court's findings on the credibility of the witnesses.

## V.

## WHETHER FRANKENMUTH RELIED ON THE ZAHRANS' MISREPRESENTATIONS WAS NOT AN ISSUE IN THIS CASE UNDER WISCONSIN LAW.

The Zahrans contend that all of the defendant attorneys were negligent for not arguing that Frankenmuth could not prevail on the counterclaim, because Frankenmuth could not prove reliance on the Zahran misrepresentations. Petition pp. 17, 20. The argument is that in making its payments Frankenmuth did not rely upon the Zahrans' proofs of loss, and, therefore, Frankenmuth should not have been permitted to assert misrepresentation. This argument has consistently failed, for good reason. Reliance is not an element required to establish material misrepresentation in a proof of loss. *Tempelis v. Aetna Casualty & Surety Co.*, 164 Wis. 2d 17, 27, 473 N.W.2d 549 (Ct. App. 1991), *affirmed and modified on other grounds*, 169 Wis. 2d 1, 485 N.W.2d 217 (1992). The court of appeals, in its opinion in the underlying tornado litigation, stated that Frankenmuth did not have to prove reliance in order to defeat the Zahrans' claim, citing *Tempelis*. *Zahran v. Frankenmuth Mutual Ins. Co.*, 19 F.3d 1436, 1994 WL 107909 (7th Cir. Wis.); R. 383, Ex. 84, footnote 1, page 4. The Zahrans nonetheless made the same arguments to the same court in this case.

The *Tempelis* decision is but one expression by Wisconsin courts holding that reliance is not necessary to void a policy. *See also American Casualty Company of Reading, PA v. Cianciolo, Inc.*, 987 F.2d 1302 (7th Cir. 1993), citing *Dohman Company v. Niagara Fire Insurance Company*, 96 Wis. 38, 71 N.W. 69 (1897); *Stebane Nash Company v. Campbellsport Mutual Insurance Company*,

27 Wis. 2d 112, 124, 133 N.W.2d 737 (1965). The *Tempelis* policy provided for the voidance of the contract of insurance upon concealment or fraud in "any material fact or circumstance." *Tempelis*, 164 Wis. 2d at 27. Here, the Frankenmuth policy is void if the insured has willfully concealed or misrepresented any material fact or there has been fraud or false swearing by an insured regarding any matter relating to the insurance. The policy clearly allows the policy to be declared void absent any reliance. An Amendatory Endorsement for Wisconsin added the following language to the Zahran's policy:

> No misrepresentation or breach of affirmative warranty affects our obligation under the policy unless:
>
> 1. we rely on it and it is material or it is made with intent to deceive; or
>
> 2. the fact misrepresented or falsely warranted contributes to the loss.

R. 383, Trial Exh. 2.

The Zahrans' policy is virtually identical to the *Tempelis* policy. Because of the policy provisions and the law in Wisconsin, reliance on misrepresentations in the Zahrans' proofs of loss was never an issue in the tornado case. The claim that the defendant attorneys should have pursued this legally vacant argument is without merit. It is an argument that could only be supported by someone obviously unfamiliar with Wisconsin law, such as Mr. Gooch.

## VI.

## THE ATTORNEYS REPRESENTING THE ZAHRANS DID NOT HAVE A CONFLICT OF INTEREST BECAUSE OF THE "INNOCENT INSURED" DOCTRINE.

Under Wisconsin law, an "innocent insured" is entitled to recover benefits from an insurance policy triggered by the wrongful conduct of another insured only under strictly defined and limited circumstances. *See Hedtcke v. Century Insurance Company*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982), *State Farm Fire and Casualty Insurance v. Walker*, 157 Wis. 2d 459, 459 N.W.2d 605 (Ct. App. 1990). In *Hedtcke* the Wisconsin Supreme Court ruled that an "innocent insured" should not be saddled with the wrongdoing of another that might void the policy. The court specifically noted that even if the court was able to distinguish between the acts of the wrongdoing insured and the innocent insured, the "innocent insured" rule would not apply if the wrongdoing insured would benefit from the recovery by the innocent insured. *Hedtcke*, 109 Wis. 2d at 489.

When the subject conduct involves fraud *after* the loss, as opposed to the cause of the loss, the innocent insured rule does not apply. *Walker*, 157 Wis. 2d at 463.

Karen Zahran was not an "innocent insured." In fact, this whole argument was abandoned during the trial. After the court and the parties spent innumerable hours on the alleged conflict of interest/innocent insured contention, Karen Zahran's attorney finally admitted that the innocent insured argument was without any factual support. R. 390 pp. 141-148.

Even before this action was *filed* the Seventh Circuit had concluded that the Zahrans' innocent insured argument had no merit.

> There is, incidentally, a good reason why the innocent insured argument was not made. In *Hedtcke* the court noted that the trial court would have the authority to see that the wrongdoer insured would not benefit from the proceeds; something easy to do in *Hedtcke* because the guilty insured was hostile to the innocent insured and may have damaged the property to hurt her. (Judith Hedtcke, the innocent insured, had vacated the marital home, initiated divorce proceedings and obtained a court order directing Ronald Hedtcke to vacate the premises. Ronald, who later pled guilty to arson, burned the property three days before he had to vacate it). We do not see how it could be done in this case, and we suspect that the Zahrans' counsel also did not see how Karen Zahran could be paid without conferring some benefit on Robin Zahran.

*Zahran v. Frankenmuth*, Case No. 92-1778, 92-1848 (7th Cir., March 28, 1994), *reh'g denied*, June 9, 1994.

After that passage was written the trial court and the parties still spent much time and effort on this issue, only to have it abandoned. The fact that this is still being argued is proof positive of the Zahrans' propensity to advance "frivolous arguments" in an effort to "re-litigate their case on appeal." Court of Appeals Order, September 7, 1999, p. 3.

The Frankenmuth counterclaim was based upon the sworn proofs of loss signed by Karen Zahran. R. 383, Trial Ex. 403. Karen Zahran represented that the damages claimed were true and accurate. R. 390 pp. 74-77. She participated in the misrepresentation.

Even if she had not participated in the misrepresentation, the policy would still be voided. The fact is that Karen could not recover without some benefit going to Robin Zahran. The Zahrans' innocent insured argument never was viable, and the defendant attorneys could not be negligent for not raising the issue.

## VII.

## THE JUDGES BELOW WERE PROPERLY ASSIGNED TO THE CASE, AND THEY WERE NOT PREJUDICED AGAINST THE ZAHRANS, OR MOTIVATED BY REVENGE AGAINST THE ZAHRANS.

The Petition contains several references to alleged prejudice and abuse by Judge Clevert and the Seventh Circuit. *See* Petition pp. 17, 22, 23, 24, 25, 27 and 28. For example, the Zahrans have suggested that the Seventh Circuit was exercising "revenge against Zahrans" or are acting "pursuant to some other motive." Petition pp. 27-28. These statements are preposterous, of course, but they do provide a thumbnail sketch of the world according to Zahran: if they do not get what they want, they have been victimized by prejudice.

The Zahrans state that the lower courts "displaced the law of the State of Wisconsin and inserted their own without support of legal precedence . . . ." Petition p. 24. There is, not surprisingly, no specificity with respect to this charge. Similarly, it is alleged that Judge Clevert and the Seventh Circuit "totally ignored Wis. Law referencing reliance, estoppel, innocent insured, policy provisions governing the contract . . . ." Petition p. 24. This assertion is based on Zahrans' incorrect interpretation of Wisconsin law, an interpretation that has been repeatedly addressed and rejected by the courts below.

The attacks on Judge Clevert consist of nothing but vague generalities, with two exceptions. The Zahrans allege that Judge Clevert was "loud, mad, and threatening to hold Karen Zahran's attorney in contempt" and they contend that Judge Clevert's "striking" of the jury demands was a premeditated intentional act, somehow wrongful. *See* Petition p. 26. The jury demand issue has been dealt with above, and will not be revisited at this point.

As to the other allegation, the threat of contempt, there was, in fact, one point during the trial when Judge Clevert did threaten to hold Karen Zahran's attorney in contempt. That threat was entirely warranted, and the judge's exasperation was tied to one of the main issues in the case.

Attorney John Bickley had been counsel for Robin and Karen Zahran. He withdrew from representing Robin, and continued to represent Karen Zahran through the trial. The pretext was that the Zahrans had different interests, and an attorney might have a conflict of interest in representing the two of them, just as the defendant attorneys allegedly had a conflict when they had represented both of the Zahrans. However, this was nothing but a subterfuge whereby Mr. Zahran and his wife were given separate opportunities to present and cross-examine witnesses.

As the trial went on it became very clear that there was no divergence of their interests. They cooperated with each other at every turn, just as they always had. It got to the point where Mr. Bickley was making objections that did not involve his client, Karen Zahran, but only related to Robin Zahran. The trial dragged on because Mr. Zahran and Mr. Bickley were both given opportunities to examine, when, as it turned out, that really should not have been allowed. (In the end Mr. Bickley acknowledged that there was no factual basis for the innocent insured argument. R. 390 pp. 141-148) Mr. Bickley was clearly taking positions

favorable to Mr. Zahran, even interposing objections that were clearly not properly made as to the interests of his client, Mrs. Zahran. When Mr. Bickley persisted in making objections relating to Robin Zahran's case, the judge cautioned Mr. Bickley in no uncertain terms. The judge took pains to explain why he was troubled by Mr. Bickley's objections, and his concern went right to the question of whether the Zahrans were attempting to manipulate the situation by contending that Mr. Bickley was only protecting the interests of Mrs. Zahran. (R. 389A pp. 162-167).

Judge Clevert's statements were not an indication of prejudice or ill will. His statements reflected the legitimate concern that his courtroom was being improperly used as a forum for the Zahrans to continue their interminable, vexatious, meritless litigation, now through a subterfuge that gave Robin Zahran free reign to rail as he pleased, without risk, since his interests were still being represented by Mr. Bickley.

Finally, the Zahrans never asked that Judge Clevert recuse himself. This bias and prejudice argument has arisen after the Zahrans lost the case. Certainly it is not proper for a party to litigate the case to conclusion, without suggesting recusal, and then contend, after the case is lost, that the judge was biased and should have recused himself.

## VIII.

## THE TRIAL COURT PROPERLY EXERCISED DISCRETION OVER THE ADMISSION OF EVIDENCE.

The Zahrans' Petition contends that the Zahrans were improperly refused the opportunity to prove certain matters at trial. The district court gave the Zahrans every opportunity to explain why the court should permit certain evidence. *See, e.g.*, R. 392, pp. 4-23, 47-53. The Zahrans could not

state a valid reason for allowing the evidence, so the evidence was not admitted. The trial court's evidentiary rulings were all well within the bounds of discretion of a trial judge. We will briefly address a few of such rulings.

**A. The Pre-Trial Orders Relating to the Opinions of Mr. Gooch.**

Various district court orders required the pre-trial disclosure of the names of experts and expert reports. The Zahrans produced a report from Thomas Gooch. At the pre-trial conference, when various motions were argued, the court heard extensive arguments concerning the opinions to be offered by Mr. Gooch at trial. The court ruled that the opinions to be offered by Mr. Gooch at trial would be limited to those opinions disclosed in Mr. Gooch's report. (R. 312). At various times during the trial the court, consistent with that ruling, limited the opinions of Mr. Gooch, and limited the presentation of evidence from other witnesses, when the proof would not have been in furtherance of or related to any of Mr. Gooch's opinions. *See, e.g.*, R. 380 pp. 69, 75, 98-99, 107-110. This was proper since the Zahrans needed expert testimony to prove their case, and there was no reason to allow evidence supporting alleged theories that were not the subject of an expert opinion.

**B. The Pre-Trial Order Relating to Evidence of Alleged Conspiracy.**

Mr. Zahran blames all of his attorneys for not asserting a conspiracy theory, and for not making it a part of the tornado case. The trial court properly excluded Mr. Zahran's proffered testimony about these subjects, but the Zahrans still contend that they should have been allowed to prove a conspiracy. Petition p. 26. During discovery Mr. Zahran did not produce any evidence of a conspiracy. After a hearing the court properly precluded Mr. Zahran from using this trial as a forum

for his conspiracy theory. R. 312 p. 26. The court's decision on this was proper for a variety of reasons.

First, the conspiracy theory had no merit. The Zahrans had previously been given wide latitude in their effort to prove that Frankenmuth and others were involved in a conspiracy to harm the Zahrans. Their efforts in that regard had been totally unsuccessful. The conspiracy theory was heard and dismissed in the fire case, a case the Zahrans tried *pro se*, and in the subsequent case they brought against Frankenmuth and the Manitowoc Sheriff's Department. Courts repeatedly ruled that there was no evidence to support these claims. (R. 171, Exhibits 16, 17, 21). The trial court in this case was not required to give the Zahrans yet another opportunity to raise these meritless allegations.

Second, evidence about this conspiracy theory was irrelevant. The Zahrans had no expert opinion to the effect that the conspiracy theory could have been proved, or that trying to prove the theory would have made any difference in the underlying case. Without such an opinion there was no reason to admit the Zahrans' opinion testimony that there was a conspiracy involved in the adjustment of their claims.

### C. The Trial Court's Exclusion of the Witnesses from the Underlying Case was Proper.

The Zahrans contend that they should have been allowed to call witnesses from the underlying trial as witnesses in this case. Robin Zahran wanted to call these witnesses for the stated purpose of showing that Mr. Kmiec had done "inadequate and improper cross-examination" at the tornado trial. Petition p. 26. The district court gave Robin Zahran every opportunity to state how the evidence would have related to Mr. Gooch's opinions. Robin Zahran was unable to state that there was any connection between the anticipated testimony and his expert's opinions. Therefore the court

excluded the witnesses. R. 392 pp. 4-33, 45-53; R. 393 pp. 3-19.

The district court was absolutely correct. The general statement that Mr. Kmiec was "inadequate" or "unprepared" for trial had not been mentioned by Mr. Gooch in his expert report, and Mr. Gooch did not testify to any such opinion. Since none of the testimony to be obtained from the witnesses seemed to matter, the court's discretion was exercised in an attempt to limit the time spent in this trial.

## IX.

## THIS COURT SHOULD HAVE NO INTEREST IN REVIEWING THE CONTRACT ISSUE BETWEEN KMIEC AND THE ZAHRANS, BUT IN ANY EVENT JUDGMENT IN FAVOR OF KMIEC WAS PROPER.

In the fifth section of their argument the Zahrans assert that the district court should not have granted judgment in favor of Mr. Kmiec on his counter-claim. These are the same arguments made by the Zahrans at trial and on post-trial motions. The arguments have no merit, and the Zahrans cite no legal authorities in support of the argument.

First, no new consideration is required to support modification of a contract which has not been fully performed. *Everlite Manufacturing Company v. Grand Valley Machine & Tool Company*, 44 Wis. 2d 404, 408, 171 N.W.2d 188 (1969).

Second, the modified contract does not require that Mr. Kmiec handle the matter through the appeal in order to recover the $20,000. Such an intent is not found in the modified contract drafted by Robin Zahran himself. Nor is such a condition reasonably implied in anything relating to

the agreement, including the facts surrounding Robin Zahran's preparation of the modified contract.

## X.

## PROPRIETY OF SANCTIONS.

The Zahrans petitioned this Court contending that the court of appeals has sanctioned them improperly, and, apparently, for some improper reasons such as "revenge" or some other improper motive. We did not participate in the structuring of the sanctions, but based upon what we have seen, the sanctions seem very appropriate.

## CONCLUSION

The Zahrans have failed to present any cogent reasons for this Court to issue a writ of certiorari. We respectfully submit that the Petition should be denied.

Respectfully submitted,

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